

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

27438

FILE: B-212453**DATE:** February 14, 1984**MATTER OF:** Resource Engineering Incorporated**DIGEST:**

1. A protester's continued pursuit of its protest with the contracting agency, despite the initial rejection of its protest, does not extend the time or obviate the necessity of filing a protest with GAO within 10 working days of the initial adverse agency action.
2. Under our Bid Protest Procedures, a protest must be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier. An FOIA request does not toll that requirement.

Resource Engineering Incorporated (REI) protests the exclusion of its offer from the competitive range and the award of a contract to the Arther D. Little Co. (Little), under request for proposals (RFP) No. SA-82-RSA-0049 issued by the Department of Commerce (Commerce). The solicitation requested proposals to undertake a technical and cost analysis of manganese module processing for the National Oceanic and Atmospheric Administration.

We dismiss the protest as untimely.

REI protested to Commerce on December 3, 1982, that its proposal had been improperly excluded from the competitive range. By letter of December 14, 1982, Commerce reiterated the decision to exclude REI from the competitive range, and by letter of March 23, 1983, Commerce informed REI of the award to Little. In subsequent letters to Commerce, REI continued to argue that the exclusion of its proposal was improper. REI protested to GAO on July 22, 1983.

Under our Bid Protest Procedures, 4 C.F.R. § 21.2(a) (1983), if a protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of the protester's learning of the

007959

initial adverse agency action on its protest. Here, the award of the contract to Little and Commerce's reaffirmation of its position in the letter of December 14, 1982, constituted the agency's initial adverse action against REI's protest. REI therefore was required to file a protest with our Office within 10 working days. Priest & Fine, Inc., B-210737, July 5, 1983, 83-2 CPD 54. REI did not protest to our Office until 3 months after the denial by Commerce. Also, REI's continued pursuit of its protest with Commerce, despite the initial rejection of its protest, did not extend the time or obviate the necessity of filing a protest with GAO within 10 working days of the initial adverse agency action. HCS, Inc., B-204960.2, March 23, 1982, 82-1 CPD 275. REI's protest of the competitive range exclusion is untimely and will not be considered on the merits.

REI also protests that the proposal submitted by the awardee should not have been found acceptable under the RFP. REI is untimely as to this issue also.

In its protest to this Office, REI states that "the winning proposal appears to fail to provide the detailed information requested in the Request for Proposal." REI raised this possibility, without elaboration, in letters to Commerce on December 3 and December 29, 1982. In February 1983, REI sought, pursuant to the Freedom of Information Act (FOIA), a copy of the winning proposal. Although Commerce released portions of Little's proposal in April, REI was dissatisfied with the response to its FOIA request.

After receiving the agency's final FOIA response on July 19, 1983, REI protested to this Office within 10 days, on July 22.

To be timely, REI must have filed its protest with Commerce and/or this Office within 10 working days after it knew or should have known the basis for protest. 4 C.F.R. § 21.2(b)(2) (1983). While REI apparently believes that its FOIA request met that requirement in this case, we disagree.

REI's FOIA request did not constitute a protest to the agency for purposes of the timeliness rules. The February 2 request simply asked that a copy of the winning proposal be

released. Barclay & Hobbs, Inc., B-203390, June 17, 1981, 81-1 CPD 507.

Although the record is unclear as to when REI first became aware that Commerce considered Little's proposal acceptable, it is apparent that REI was aware of this fact no later than March 23, 1983, when it was notified of the award. In addition, the award notice included a memorandum to the file dated February 3, 1983, explaining the award rationale. To be timely, REI must have protested within 10 days of determining that the agency allegedly improperly evaluated proposals. Davey Compressor Company, B-195425, November 14, 1979, 79-2 CPD 351. In fact, REI did not protest until over 3 months after notice of award.

It is not uncommon for a firm, upon learning of award to a competitor, to lodge with this Office whatever protest basis it may have and still pursue a request with the contracting agency under FOIA. For purposes of the timeliness rules, we require only that a protester articulate its reasons for objecting to an agency action and, in appropriate cases, this Office may defer action on a protest while an FOIA request is pursued. However, that decision is for this Office to make and we have consistently required that protests be filed promptly after the basis for protest becomes known. Once it had grounds for protest, REI could not toll the timeliness requirement because of a perceived need to analyze the situation or obtain additional information. Davey Compressor Company, supra.

H. R. Van Cleve
Harry R. Van Cleve
Acting General Counsel